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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY F. BOWLING,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 70A01-0602-PC-51

APPEAL FROM THE RUSH CIRCUIT COURT
The Honorable Barbara A. Harcourt, Judge
Cause No. 70C01-9407-CF-00039

September 8, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Jerry F. Bowling appeals the consecutive sentences imposed following his convictions for Robbery,¹ a class B felony, and Auto Theft,² a class D felony. Specifically, Bowling contends that the trial court abused its discretion in ordering consecutive sentences on these offenses because the aggravating factors identified by the trial court only supported an enhanced sentence. Bowling also claims that the aggravating circumstances identified by the trial court violated the rule announced in Blakely v. Washington³ because a jury did not find those factors. Additionally, the State cross-appeals contending that the appeal must be dismissed because the trial court abused its discretion in granting Bowling's petition to file a belated notice of appeal. Finding no error, we affirm the judgment of the trial court.

FACTS

On June 30, 1994, Diane Malone was driving her vehicle in Rush County and noticed Bowling walking down the street. Because Malone was acquainted with Bowling, she stopped and offered him a ride. After Bowling entered Malone's vehicle, an argument ensued. At some point, Bowling struck Malone several times in the face and took control of the vehicle. Bowling then forced Malone to disrobe and ordered her to the back of the vehicle and demanded money from her. After Malone complied, she was eventually able to exit the vehicle by convincing Bowling to stop at a gas station and refuel. After Malone

¹ Ind. Code § 35-42-5-1(2).

² Ind. Code § 35-43-4-2.5.

³ 542 U.S. 296 (2004).

escaped, Bowling re-entered the vehicle and drove away. A high-speed chase ensued and Bowling was eventually apprehended and arrested.

As a result of the incident, Bowling was charged with battery, kidnapping, criminal confinement, robbery and auto theft. The State also alleged that Bowling was a habitual offender. Thereafter, on January 30, 1995, Bowling pleaded guilty to robbery and auto theft in exchange for the State's dismissal of the remaining charges.

At the sentencing hearing conducted on February 13, 1995, the trial court sentenced Bowling to twenty years for robbery and three years for auto theft with six months suspended. The trial court identified several aggravating circumstances including Bowling's extensive criminal history, which consisted of juvenile offenses that occurred in 1969, eleven felony convictions, and seven incarcerations in three different states. The trial court also cited the unsuccessful attempts at rehabilitation, the nature of the crime resulting in "emotional damage" to Malone, and the fact that Bowling had been a friend of Malone, as aggravating circumstances. Tr. p. 86. The trial court identified Bowling's "mental factors" as a mitigating circumstance as well as the determination that the crime had not been planned. Id. In the end, the trial court ordered Bowling's sentences to run consecutively for an aggregate term of twenty-three years with six months suspended.

On January 29, 2001, Bowling filed a petition for post-conviction relief, claiming, among other things, that his guilty plea was not voluntarily entered and that his trial counsel was ineffective. However, on March 23, 2005, Bowling moved to dismiss his initial request for post-conviction relief without prejudice and filed a petition for appointment of counsel to

pursue relief under Post-Conviction Rule 2. The trial court granted Bowling's petition, and Bowling then sought the trial court's permission to file a belated notice of appeal on April 21, 2005. Following a hearing, the trial court granted Bowling's petition. On January 19, 2006, Bowling filed his belated notice of appeal.

I. State's Cross Appeal

Before proceeding to the merits of Bowling's claims, we first address the State's cross-appeal. In essence, the State argues that this appeal should be dismissed because Bowling did not present any evidence showing that he diligently pursued an appeal or that any delay should not be attributable to him.

In resolving this issue, we first note that the trial court has discretion in reviewing a petition for permission to file a belated notice of appeal, and its decision will not be disturbed unless an abuse of discretion is shown. Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), trans. denied.⁴ Our Supreme Court has determined that a defendant who pleads guilty to an offense in an open plea is entitled to challenge a sentence on direct appeal in accordance with Post-Conviction Rule 2. Collins v. State, 817 N.E.2d 230, 232-33 (Ind. 2004). Post-Conviction Rule 2 provides that:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

⁴ While the State maintains that we should review the trial court's decision de novo, that standard of review applies when the allegations contained in the motion itself provide the only basis in support of a motion for a belated appeal. Townsend, 843 N.E.2d at 974 (citing Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005) (holding that de novo review is appropriate when no hearing was held on the defendant's petition).

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. . . . If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

The trial court must consider the factors set out in Post-Conviction Rule 2 in ruling upon a defendant's motion, and the defendant has the burden of proving his grounds for relief by a preponderance of the evidence. Tolson v. State, 665 N.E.2d 939, 942 (Ind. Ct. App. 1996). We also note that the decision as to whether the defendant is responsible for the delay is within the trial court's discretion. A defendant must be without fault in the delay of filing.

There are no set standards defining delay or diligence, as each case must be decided on its own facts. Factors affecting the determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. Beaudry v. State, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002).

In this case, Bowling filed a petition for a belated appeal on April 21, 2005, and the supplemental petition that he filed specifically asserted that his defense counsel "has been diligent in requesting such permission." Appellant's App. p. 257. While the State points out that Bowling's petition did not set forth any specific assertions, supporting affidavits, or other documentation in support of his claim that any delay was not his own and that he had

been diligent in pursuing his belated appeal, the trial court conducted a hearing on Bowling's motion to file the belated notice of appeal in this instance. However, as the State points out, the transcript of this hearing is not contained in the record, and the State has offered no evidence in support of its claim on cross-appeal that the trial court failed to consider and weigh the evidence with regard to the factors pertaining to Bowling's diligence. Thus, we decline to find that the trial court abused its discretion in granting Bowling's petition to file a belated appeal. Hence, we proceed to address Bowling's contentions on the merits.

II. Consecutive Sentences

Bowling contends that the trial court erred in ordering his sentences to run consecutively. Specifically, Bowling argues that the sentences cannot stand because, while the trial court explained its reasons for enhancing the sentences,⁵ it failed to explain its reasons for ordering consecutive sentences.

At the outset, we note that sentencing decisions are generally left to the trial court's sound discretion and are reviewed for an abuse of discretion. Anderson v. State, 798 N.E.2d 875, 879 (Ind. Ct App. 2003). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts. Weis v. State, 825 N.E.2d 896, 900 (Ind. Ct App. 2005).

In reviewing a sentencing decision, this court may consider both the written sentencing order and the oral sentencing statement at the sentencing hearing. See Corbett v.

⁵ When Bowling was sentenced, the presumptive sentence for a class B felony was ten years, Ind. Code § 35-50-2-5, and the presumptive sentence for a class D felony was one and one-half years. I.C. § 35-50-2-7.

State, 764 N.E.2d 622, 623 (Ind. 2002). If a trial court imposes consecutive sentences when it is not required to do so by statute, it must explain its reasons for the sentence including: 1) identification of all significant mitigating and aggravating circumstances; 2) the specific facts and reasons that lead the court to find the existence of each circumstance; and 3) an articulation showing that the factors have been evaluated and balanced. Ortiz v. State, 766 N.E.2d 370, 376 (Ind. 2002).

We also note that a trial court's sentence enhancement is a separate and distinct decision from the imposition of consecutive sentences. Haggard v. State, 771 N.E.2d 668, 676 (Ind. Ct. App. 2002). However, the statutory provisions addressing sentence enhancement and consecutive sentencing are not mutually exclusive. Id. That is, the same aggravating circumstances can be used to both enhance a sentence and order the sentences to be served consecutively. Allen v. State, 722 N.E.2d 1246, 1253 (Ind. Ct. App. 2000). Further, there is no requirement that the trial court identify the aggravators that supported the sentence enhancement separately from the factors that supported consecutive sentences. Id. A single aggravating circumstance may be used both to enhance a sentence and to impose consecutive sentences. Id.

In this case, Bowling argues—and the State concedes—that neither the oral sentencing statement nor the written sentencing order appears to explain the trial court's reasons for imposing consecutive sentences. Appellant's App. p. 98-99; Tr. p. 86. However, notwithstanding such an omission, the trial court identified a number of aggravating circumstances at the sentencing hearing as a basis for enhancing the sentence including

Bowling's lengthy criminal history, the previous unsuccessful attempts at rehabilitation, his relationship to Malone, and the emotional damage that she suffered because of the incident. As a result, Bowling's argument fails.

III. Aggravating Circumstances and Blakely

In a related argument, Bowling claims that the trial court erred in enhancing his sentences because the aggravating circumstances that the trial court found violated the rule announced in Blakely. Hence, Bowling asserts that the sentence may not stand because a jury did not specifically find the aggravating circumstances.

In Blakely, the United States Supreme Court held that the Sixth Amendment to the United States Constitution requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. Specifically, Blakely determined that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301. The Blakely court went on to note that "the statutory maximum for Appendi [v. New Jersey], 530 U.S. 466 (2000)] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. In Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), our Supreme Court determined that the "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Hence, it was determined that Indiana's then-existing presumptive sentencing scheme

violated Blakely. Id. at 686.

Even if we were to conclude that Bowling could properly challenge the finding of aggravating circumstances under Blakely, he does not prevail. As noted above, a defendant's criminal history is exempt from the Blakely analysis. Mitchell v. State, 844 N.E.2d 88, 91 (Ind. 2006). Additionally, a sentence may be upheld even when an improper aggravating factor is used to enhance a sentence so long as other valid aggravating factors exist. Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003). And this "harmless error" analysis has been applied to Blakely errors. Rembert v. State, 832 N.E.2d 1130, 1133 (Ind. Ct. App. 2005). Moreover, we have held that if a trial court has erroneously used an improper aggravator, this court can still affirm the sentence if we can say with confidence that the same sentence is warranted without it. Whaley v. State, 843 N.E.2d 1, 16 (Ind. Ct. App. 2006), trans. denied. Finally, it has been held that a defendant's criminal history alone may be adequate to justify an enhanced sentence. Guillen v. State, 829 N.E.2d 142, 149 (Ind. Ct. App. 2005), trans. denied.

Here, even assuming that all of the aggravating factors—aside from Bowling's criminal history—violated the rule announced in Blakely, the trial court noted at the sentencing hearing that Bowling had an "extensive criminal record, which has been during the period from 1969, which began with juvenile matters and continuing regularly up to the present." Tr. p. 86. In correspondence that Bowling filed with the trial court, he admitted that he "had somewhere around 11 felony convictions, and seven incarcerations in three different states." Appellant's App. p. 46. Approximately ninety percent of Bowling's

convictions have been violent and are drug and alcohol related. Id.

Even when considering Bowling's lengthy and violent criminal history as the lone valid aggravating circumstance along with the mitigating circumstances that the trial court identified, we are convinced that the trial court would have imposed the same sentence. Thus, we find no error.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.